

McGREGOR W. SCOTT
United States Attorney
S. ROBERT TICE-RASKIN
Assistant U.S. Attorney
501 I Street, Suite 10-100
Sacramento, California 95814
Telephone: (916) 554-2738

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	CR. No. S-03-535-DFL
)	
Plaintiff,)	<u>FINDINGS OF FACT</u>
)	<u>AND CONCLUSIONS OF LAW FOR</u>
v.)	<u>SENTENCING PURSUANT TO</u>
)	<u>FED.R.CRIM.P. 32</u>
DARRYL SCOTT POLL,)	
)	
)	
Defendant.)	
_____)	

Plaintiff, through its counsel of record, and defendant, with his counsel of record, appeared for sentencing on 1 June 2007. The following constitute the Court's findings, conclusions and determinations pursuant to Fed.R.Crim.P. 32 with respect to the defendant's objections and the Government's objections:

I. Defendant's Objections

PSR Page 2, PSR ¶ 12: Aliases

The Court will not resolve this factual issue or consider it for the purposes of sentencing as it will not materially impact the sentencing analysis, whether under the Guidelines or 18 U.S.C. § 3553. Defendant withdraws this objection.

PSR ¶ 8: Injunction

The Court believes that the previous injunction from the CDCA clearly applies to the offense conduct at issue in this case and that any reasonable person would have understood the injunction to bar the manufacture and sale of descramblers nationwide. That said, the Court deferred ruling on this objection.

PSR ¶ 10: Why Defendant Started His Illegal Operations

The Court deferred ruling on this objection.

1 PSR ¶¶ 10, 11: Locating the Business in Las Vegas

The Court has not ruled on this objection.

2 PSR ¶¶ 10, 11: Decision Making for the Business

3 The Court has not ruled on this objection.

4 PSR ¶ 11: Place of Business

5 The Court has not ruled on this objection.

6 PSR ¶ 12: Lack of Signage in Simi Valley

7 The Court will not resolve this factual issue or consider it
for the purposes of sentencing as it will not materially impact the
sentencing analysis, whether under the Guidelines or 18 U.S.C. §
3553. Defendant withdraws this objection.

8 PSR ¶ 13: Advertising

9 Defendant's objection is sustained. The PSR will be amended to
reflect that none of the cable business advertisements mentioned
10 access to pay-per-view.

11 PSR ¶ 14: Stolen Descramblers

12 Defendant withdraws this objection.

13 PSR ¶ 15: Drop Shipping

14 The Court will not resolve this factual issue or consider it
for the purposes of sentencing as it will not materially impact the
sentencing analysis, whether under the Guidelines or 18 U.S.C. §
3553. Defendant withdraws this objection.

15 PSR ¶ 16: Cablevision Injunction

16 The Court will not resolve this factual issue or consider it
for the purposes of sentencing as it will not materially impact the
sentencing analysis, whether under the Guidelines or 18 U.S.C. §
3553. Defendant withdraws this objection.

17 PSR ¶ 17: Red Rock Group

18 The Court will not resolve this factual issue or consider it
for the purposes of sentencing as it will not materially impact the
sentencing analysis, whether under the Guidelines or 18 U.S.C. §
3553. Defendant withdraws this objection.

19 PSR ¶¶ 18, 19, 28, 29, and 31 Gross Sales and Infringement Amount

20 Considering USSG §2B5.3 and its objectives as a whole, and the
21 facts of this case, the Court believes that the most appropriate
22 analytical approach to calculating infringement amount is under USSG
23 § 2B5.3, note 2(A)(iv). In the Court's view, it is reasonable to
24 believe that the infringed amount, per descrambler, was the fair
market value paid to purchase a descrambler by a willing purchaser
25 who expected to receive cable programming that would equal or exceed
that retail purchase price. The Court expressly rejects defendant's
26 argument that the calculation of loss is to be calculated by the
statutory provisions of 47 U.S.C. § 553(c) related to civil lawsuits
27 for cable theft and defendant's related argument that loss for the
purposes of sentencing is limited to either proven actual loss or
28 \$10,000. This case is governed by the advisory Sentencing

Guidelines. Given that, the Court is inclined to agree with the Probation Officer's recommendation, that is, that the infringement amount was over \$7,000,000 (because defendant sold approximately 50,000 descramblers at an average price of \$200 per descrambler), and that defendant's offense level should be increased by 20 levels under USSG § 2B5.3(b)(1). A final ruling as to the exact infringement amount is deferred.

PSR ¶¶ 20-21: Seizures

Defendant withdraws this objection.

PSR ¶ 32: Commercial Distribution of Works/ Manufacture of Infringing Items

The Court tentatively believes that a two-level adjustment under USSG §2B5.3(b)(2) is warranted as the offense involved the display or distribution of a work being prepared for commercial distribution.

The Court is still considering whether a two-level increase is warranted under USSG §2B5.3(b)(3), as suggested by the Probation Office and the Government, because the offense involved the manufacture of infringing items, that is, cable boxes that allowed consumers to illicitly obtain programming from cable television providers.

PSR ¶ 33: Leadership Role

The Court tentatively believes that a four-level adjustment may be warranted because defendant either organized or was a leader of otherwise extensive criminal conduct, pursuant to USSG §3B1.1. The Court notes that the leadership adjustment can, as appropriate, be applied to co-leaders or co-organizers. The Court deferred ruling.

PSR ¶ 36: Adjusted Offense Level

No ruling has been made.

PSR ¶ 39: Acceptance of Responsibility

No ruling has been made.

PSR ¶ 40: Total Offense Level

No ruling has been made.

PSR ¶ 46: Defendant's Burglary Arrest

Defendant, contrary to his previous denial, now admits that he was arrested for burglary in 1979 as indicated in the PSR. Defendant withdraws this objection.

PSR ¶ 49: Defendant's Father

The Court will not resolve this factual issue or consider it for the purposes of sentencing as it will not materially impact the sentencing analysis, whether under the Guidelines or 18 U.S.C. § 3553. Defendant withdraws this objection.

PSR ¶ 52: Defendant's Physical Condition

The Court does not construe this as an objection.

PSR ¶ 58: Defendant's 1999-2003 Employment

1 The Court will not resolve this factual issue or consider it
2 for the purposes of sentencing as it will not materially impact the
3 sentencing analysis, whether under the Guidelines or 18 U.S.C. §
4 3553. Defendant withdraws this objection.

5 PSR ¶ 62: Fine

6 The Court has tentatively indicated that it believes a
7 substantial fine is warranted (in the range of perhaps \$500,000)
8 because of the nature of the offense and the difficulties associated
9 with calculation of restitution. The Court needs to determine what
10 fine is reasonable in light of defendant's actual or potential
11 ability to pay.

12 PSR ¶ 64: Guideline Provisions

13 The Court has not ruled on this objection.

14 PSR ¶ 65: Probation

15 Defendant withdraws this objection.

16 PSR ¶ 70: Downward Departure Requests (Erroneously referenced by
17 defendant as PSR ¶ 69)

18 The Court construes these objections as legal arguments which
19 the defense may advance as it deems appropriate.

20 PSR ¶¶ 73-75: Factors under 18 U.S.C. § 3553(a)(2)

21 The Court construes these objections as legal arguments which
22 the defense may advance as it deems appropriate.

23 **II. Government's Objections**

24 PSR ¶ 34: Circumventing a Technological Security Device

25 The Court sustains the Government's objection to the PSR and
26 finds, contrary to the recommendation of the Probation Office, that
27 a two-level enhancement under §§ 2B5.3, comment (n.3), 3B1.3 is
28 applicable in this case because defendant circumvented a
technological security device to gain access to an infringed item.

PSR ¶¶ 68-69: Upward Departures

The Court construes these objections as legal arguments which
the Government may advance as it deems appropriate.

PSR ¶¶ 73-75: Factors under 18 U.S.C. § 3553(a)(2)

The Court construes these objections as legal arguments which
the Government may advance as it deems appropriate.

III. Defendant's Request for an Evidentiary Hearing

The Court grants defendant's request for defendant to testify
on the following topics:

- Defendant's role in the operation/management of the
descrambler business;
- Any personal or physical mitigating circumstances;
- Defendant's ability to pay a fine; and
- Defendant's explanation related to the CDCA injunction.

1
2 The Court also grants defendant's request to present three
3 character witnesses. Defendant shall submit declarations for all
4 such witnesses and examination of the same by the defense shall last
for no more than five to ten minutes.

5 DATED: June 13, 2007

6 /s/ David F. Levi
7 DAVID F. LEVI
8 Chief Judge
9 United States District Court
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28